NO. 2818

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES and ANNIE K. BOYD and ROBERT N. BOYD and VICTOR K. BOYD, by their Guardian ad Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and HENRY HOLMES, Trustees under the Will of John J. Sullivan, HENRIETTA SULLIVAN, JOHN BUCKLEY, PRISCILLA ALBERTA SULLIVAN CLARKE and ROBERT KIRKWOOD CLARKE, a Minor, JUANITA ELLEN CLARKE, a Minor, and THOMAS WALTERS CLARKE, a Minor.

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

In Error to the Supreme Court of the Territory of Hawaii.

ANDREWS & PITTMAN and FRANK ANDRADE,
Attorneys for Plaintiffs in Error.

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Statement of the Case.

This is an action to quiet title brought in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which the Plaintiffs in Error were the plaintiffs and the Defendants in Error were the defendants. The action to quiet title in the Territory of Hawaii being a statutory one and brought on the law side of the court, was tried before the Honorable T. B. Stuart, Third Judge of the Circuit Court

of the First Judicial Circuit, Territory of Hawaii, sitting without a jury. It appeared from the evidence in the case that one, Alexander Adams, Jr., was the owner of the property in question and on September 15, 1858, he made a deed to his daughters, Peke and Maria, of a large number of properties, including the property in question. This deed was in the Hawaiian language, a translation of which was offered in evidence. (See pages 77 and 78 of Transcript and also page 40 of Transcript for a translation of the Adams deed.) It further appeared from the evidence that the said daughters executed deeds of said land and, by mesne conveyances, it became the property of the defendants; that the said Maria died in 1894, having been out of possession of said land for many years; that the said Peke died on the 5th day of June, 1914, leaving surviving her two children, namely, Mary Kaleialii, one of the plaintiffs, and Robert N. Boyd, who died on September 9, 1914, leaving surviving him four children, the other plaintiffs herein. The claim of the plaintiffs was that the deed of Alexander Adams, Jr., to his daughters was a deed of a life estate only in the lands in question with remainder to their children and that, regardless of the action of Peke in conveying said land, the title was vested in her children upon the death of said Peke. Upon the conclusion of the case, the judge reserved decision and thereafter ordered that the construction of said deed be submitted to the Supreme Court of the Territory of Hawaii on reserved questions of law. (See

Transcript of Record, page 30.) In accordance with said order of the court, the following questions were reserved to the Supreme Court of the Territory of Hawaii:

1. What interest or estate in said land did said deed from Alexander Adams, Jr., convey to said Peke?
2. What interest or estate, if any, in said land did said deed from Alexander Adams, Jr., convey to such children, if any, of Peke as are referred to in said deed?

The Supreme Court of the Territory of Hawaii in an opinion rendered on the 9th day of November, 1915, rendered the following decision on the reserved questions:

"We are of the opinion that the deed from Alexander Adams, Jr., to his daughters, Peke and Maria, gave them each a fee simple in an undivided one-half of the land." (See pages 51 to 61 of Transcript of Record.)

Thereafter, a decision was rendered by the Honorable T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which he held that the questions decided by the Supreme Court were decisive of the case, and judgment was rendered in favor of the defendant. (See page 63, Transcript of Record.) Upon this decision, a judgment of the Circuit Court was entered in favor of the defendants and against the plaintiffs. (Pages 64 and 65 of Transcript of Record.) From this judgment a writ of error was issued returnable

to the Supreme Court of the Territory of Hawaii (see page 146, Transcript of Record) and judgment was entered in the Supreme Court of the Territory of Hawaii in favor of the defendants in error and against the plaintiffs in error, on the ground set forth in the former decision of the Supreme Court upon the reserved questions of law. From this decision a writ of error was taken returnable to the United States Circuit Court of Appeals for the Ninth Circuit on the following assignments of error:

I.

The court erred in sustaining the Circuit Court of the First Judicial Circuit in construing the deed of Alexander Adams, Jr., dated September 15, 1858, offered in evidence as Exhibit "A" in said case, as conveying to Peke and Maria, his daughters, an estate in fee, giving to each an undivided one-half (½) of the land set forth in said deed. Said construction so given by said Circuit Court was and is contrary to law, contrary to the evidence in the case and contrary to the intent of said grantor, as gathered from and shown by the deed in its entirety, and which construction thereof, by said Circuit Court, was and is prejudicial to the rights of the plaintiffs in error, and erroneous.

II.

The court erred in sustaining the Circuit Court of the First Judicial Circuit in deciding in favor of the defendants in error and in rendering and enter-

ing judgment in favor of the defendants in error and against the plaintiffs in error, to which the plaintiffs in error duly excepted.

ARGUMENT.

The only question before this court is: Did the Supreme Court of the Territory of Hawaii err in construing the deed of Alexander Adams., Jr., to his daughters, Peke and Maria, dated the 15th day of September, 1858? This deed, as has been formerly stated, was in the Hawaiian language, a translation of which, as offered in evidence, is as follows:

> This deed is an absolute conveyance of the land made this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-eight between Alexander Adams, Jr. of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters, of the same place, of the second part.
>
> WITNESSETH: That the above named Alexander Adams, Jr., of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And Whereas, the said Alexander Adams, Jr. because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed

and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands.

Now therefore this deed showeth that the above mentioned Alexander Adams, Jr. in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quit claim to the parties of the second part hereinabove mentioned all those certain pieces of land situate at Olomana, Honolulu, and the house lot situated in the town of Honolulu, along Hotel Street (L. C. A. 5049B to Keoki no Malule; deeded to me on the 3rd day of August, 1854, Royal Patent 1918, acknowledged on the 11th day of April, 1855, and also Grant 2349 and 2530 signed on the 8th of April, 1857 and the 14th day of September, 1858, and the house lot sold to me by deed from Alexander Adams, signed on the 22nd day of June, 1850, and acknowledged by A. Bates on the 22nd day of August, 1850, the descriptions of which are as follows:

4 Taro patches in Olomana (L. C. A. 5049B

R. P. 1918). Commencing at the north corner of this land and surveyed as follows:

South 33° E. 206 links along Kaholo;
South 49° W. 198 links along Government;
North 29° W. 277 links along Government dry land
North 35½° E. 31 links along Kaholo
North 61° E. 66 links along Kaholo
South 59° E. 45 links along Kaholo
North 61° E. 66 links along Kaholo
South 59° E. 45 links along Kaholo
North 70° E. 64 links along Kaholo to the place of commencement. The area is 47/100 acres.

2 Taro patches (Grant 2349). Commencing at the south corner of this and running

North 53° E. along the stream 189 links; thence
North 37° W. 125 links along Government, thence
South 49° W. 50 links, thence
North 29° W. 283 links along Keoki, thence
South 60° 50′ W. 44 links, thence
South 55° 0′ W. 113 links along Kaholo, thence
South 32° 0′ W. 342 links, thence
South 47° 0′ E. 73 links along land of Paia to the point of beginning containing 46/100 acres.

4 Taro patches and dry land (Grant 2530). Commencing at the west corner makai of this

land at the north west corner of stream along the land of Napunako and Paia and running:

South 46° E. 765 links along Paia, thence
North 39° 30′ E. 285 links along Awaiolimu,
North 23° 30′ W. 670 links along Kalokohonu to the opposite side of stream
South 68° 30′ W. 62 links along Papamakua
North 34° 0′ W. 87 links along Papamakua
South 54° 30′ W. 140 links along Papamakua
South 30° 30′ E. 75 links along Kaholo
South 60° 30′ W. 46 links along Kaholo
North 36° 30′ W. 141 links along Kaholo
South 47° 30′ W. 140 links along Napunako
South 36° 0′ E. 124 links along Napunako
South 55° 30′ E. 191 links along Napunako to the place of commencement containing 3 18/100 acres.

House lot along Hotel Street in the City of Honolulu, the land commission of which is issued to Alexander Adams, which was sold to me on the 22nd day of June, 1850, copied in Government Registry of Conveyances, Buke 4, page 214, on the 22nd day of August, 1850.

Commencing at John Duke's house along the street south east by east 1/2 E 46.6 feet, thence N. E. 1/2 N 62 feet, thence N W by W 44 feet, thence S W 1/2 W 72 feet to the place of commencement.

To have together with the things thereupon the houses and appurtenances, rights, and priv-

ileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and heirs and assigns forever.

And the above mentioned Alexander Adams, Jr. and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents.

Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.

The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well to all the contents of this deed and do hereby bind and both consent to and with the party of the first part hereinabove

mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein contained.

In witness whereof I hereby sign with my hand and seal this day and the year first above written.

(Sgd) Alexander Adams, Jr.

Made, signed and sealed in the presence of

(Sgd) J. L. Mailiili

" Kaaiahua.

Register Office, Oahu, September 15th, 1858, personally appeared before me Alexander Adams, Jr. and acknowledged that he executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) Thomas Brown,
Deputy Registrar of
Conveyances.

Received and compiled the 15th day of September, A. D. 1858, at 3/4 past two o'clock P. M.

(Sgd.) Thomas Brown,
Deputy Registrar of
Conveyances.

The plaintiffs claim that by a fair construction of the above and foregoing deed to his two daughters "Peke" and "Maria," Alexander Adams, Jr. created in each one of the said grantees an estate for the life of each one of them with a remainder over to their children, if any such children should survive the mother or mothers.

The court will find the following paragraphs con-

tained in the deed in question, in the order in which they appear in said deed:

"That the above named Alexander Adams, Jr. of his own volition, IN ORDER TO PROVIDE FOR HIS DAUGHTERS PEKE AND MARIA SO AS TO PREVENT UNAVOIDABLE INCONVENIENCE AND FOR THE CARE OF THEIR PERSONS WITH THINGS NECESSARY AS WELL AS THEIR MAINTENANCE. And whereas, the said Alexander Adams, Jr. BECAUSE OF HIS OWN DESIRE FOR THE AFORESAID DAUGHTERS THAT THEY MAY BE BENEFITED WITH THE PROCEEDS ARISING THEREFROM TOGETHER WITH THE RENTS TO THEIR CHILDREN AND ASSIGNS AS WELL AS THE PAYMENTS TO BE MADE FOR THE REAL ESTATE hereunder conveyed and described premises TO THE END OF THEIR LIVES AND FOREVER TO THEIR HEIRS, INDEPENDENT OF ALL RESTRAINING and interference of their husbands or those they may have hereafter, providing no conveyances is made to their husbands."

"Now therefore this deed showeth that the above mentioned Alexander Adams, Jr. IN CONSIDERATION OF THE STATEMENTS HEREIN MADE and of two dollars paid into his hands by the parties of the above-mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quit claim to the parties, etc."

"To have together with the things thereupon the houses and appurtenances, rights, and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part shall belong to Peke and Maria and to their representatives and heirs and assigns forever."

"And the above mentioned Alexander Adams, Jr. AND UNTIL THE DECEASE OF HIS DAUGHTERS THEY SHALL LEAVE THESE LANDS AND RIGHTS APPERTAINING TO WHOMSOEVER THEY MAY DEMISE, PROVIDING IT BE DONE IN TRUTH AND HONESTY, but SHOULD IT NOT BE MADE IN ACCORDANCE WITH THE ABOVE SUCH AS THE CONVEYANCES AND THE ACKNOWLEDGMENT THEREOF, THEN IN SUCH CASE THESE LANDS SHOULD REVERT TOGETHER WITH ALL APPURTENANCES TO ALEXANDER ADAMS, JR. OF THE FIRST PART AND TO HIS HEIRS AND THE BENEFITS SHALL ONLY BE THEIRS PROVIDING THE SECOND PARTY HAVE NO CHILDREN. BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM IN THE MANNER AS ENJOYED BY THEIR PARENTS.

"PROVIDED THAT IF ONE OF THE PARTIES OF THE SECOND PART SHOULD DIE WITHOUT ANY ISSUE LIVING AT THE TIME, ALL THE RIGHTS ABOVE MENTIONED SHALL DESCEND TO THE SURVIVOR OF THEM."

The first paragraph quoted from said deed and which constitutes a part of the premises thereof expresses and makes plain the grantor's intention:

"In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their persons with things necessary as well as their maintenance."

This portion of the Adams deed clearly indicated that the personal welfare and being of the grantees was the prime object which moved the grantor in the making of said deed.

"To prevent unavoidable inconvenience and for the care of their persons with things necessary as well as their maintenance."

And the following in the same paragraph:

"That they may be benefited with the proceeds arising therefrom together with the rents to their CHILDREN and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs."

Up to this point it is clearly manifest that Alexander Adams, Jr., intended that his daughters Peke and Maria should have the proceeds and rents arising from the land described in said deed for their lives only. While it is found that the grantor in the premises employs the term "children" and at another, the term "heirs," the early part of the premises wherein he expresses the purpose for which said conveyance was made states:

"In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance."

This, we submit, shows a clear intention to limit the estate granted to a life interest.

Again in the granting clause of said deed and as a part of the consideration therefor, he reiterates his purpose by saying: "In consideration of the statements herein made"; and then follows the granting words of said deed, which are in the usual form.

Then follows the Habendum which, if read and considered by itself, would probably defeat the contention of these plaintiffs. This is, however, immediately followed, not by a covenant or complete reddendum, but by statements explanatory of the tenure by which the lands were to be held by Peke and Maria, as follows:

"And the above mentioned Alexander Adams, Jr. AND UNTIL THE DECEASE OF HIS DAUGHTERS THEY SHALL LEAVE THESE LANDS AND RIGHTS APPERTAINING TO WHOMSOEVER THEY MAY DEMISE, PROVIDING IT BE DONE IN TRUTH AND HONESTY, BUT SHOULD IT NOT BE MADE IN ACCORDANCE WITH THE ABOVE SUCH AS THE CONVEYANCE AND ACKNOWLEDGMENT THEREOF. THEN IN SUCH CASE THESE LANDS SHOULD REVERT TOGETHER WITH ALL APPURTENANCES TO ALEXANDER ADAMS, JR. OF THE FIRST PART AND TO HIS HEIRS AND THE BENEFITS SHALL ONLY BE THEIRS PROVIDING THE SECOND PART HAVE NO CHILDREN, BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM IN THE MANNER AS ENJOYED BY THEIR PARENTS."

If there should be any doubt as to the construction which should be placed on this deed relative to the quantum of interest or estate conveyed to Peke and Maria, the paragraph just quoted is surely decisive.

"And until the decease of his daughters they shall leave these lands to whomsoever they may demise, providing it be done in truth and honesty."

This portion of the paragraph only means that a demise of this property, if done honestly and not for the purpose of defeating the rights of such children as might survive the parent, well and good; otherwise, the grantor says:

"Then in such case these lands should revert together with all the appurtenances to Alexander Adams, Jr."

Here, Alexander Adams, Jr., limits the dealings of his daughters up to and "until their decease," and this to be done with truth and honesty, and if they, Peke and Maria, should attempt to do otherwise, the lands should revert to the grantor or his heirs, and in case of an attempt on the part of Peke and Maria to convey more than the estate given them, then and in that case, after the provision for a reverter, he says: "and the benefits only shall be theirs."

This surely means that by attempting to defeat their children, Peke or Maria would again only be entitled to the benefits, meaning, the use of said property for their lives.

And again we notice in the same paragraph, after the statement relative to a possible reverter, the following:

"Providing the second part have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the same manner as enjoyed by their parents."

To further explain himself and to make it clear

that he only intended to create a life estate in his daughters Peke and Maria, Alexander Adams, Jr., adds the following paragraph:

"Provided that if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them."

If there is any uncertainty or ambiguity in the deed in question relative to the quantum of estate which became vested in Peke or Maria, or in both of them, this last paragraph surely should be conclusive.

It must be remembered that this deed was not written in the English language, but in Hawaiian, and, therefore, the intention, as expressed by reading the deed as a whole, should be the final criterion by which to judge the wish or desire of the grantor, rather than English words which, used in the translation, may not have been intended to carry the whole force and effect that an original deed in English would give to them; but are simply employed in their Hawaiian equivalent to express the formal parts of a deed.

In this connection we desire to say that the Adams' deed was prepared in Hawaiian, presumably by a Hawaiian, only a quarter of a century after civilization was introduced into these Islands, also a short time after education had even in a slight degree been established here, and just ten years after land tenures were established and recognized in Hawaii, therefore we most respectfully submit that the rigid rules of legal construction adopted by the courts of

the mainland of the United States and England, where for centuries profound learning and education has been established, should not altogether govern in this case.

"The intent of the parties to a deed, when it can be obtained from the instrument, will prevail unless counteracted by some rule of law. The intention of the parties is to be ascertained by considering all of the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law."

Nahaolehua vs. Heen, 20 Haw. 377.

We again observe Alexander Adams, Jr., by the premises of his deed is conveying to his two daughters the lands in question only "TO THE END OF THEIR LIVES and forever to their heirs, independent of all restraining and interference, etc.". The premises of said deed is followed by a paragraph commonly used in conveyancing and which, according to the case of *Budd vs. Brooke,* 43 Am. Dec. 337, is a part of the premises.

"The technical meaning of the word "premises," in a deed of conveyance, is everything which precedes the habendum; and it is in the premises of a deed that the thing is really granted. The premises of the grant before us, passing, as we conceive, the lands granted in conformity to the last will and testament of Thomas Brooke, and the declared intent of both grantor and grantees, the next inquiry to be answered is, has the habendum such controlling influence over the grant as to defeat the estates created by the premises, and substitute, in their places, entirely different estates, contrary to the manifest intent of the parties to the grant? According to our construction of the grant, made by the premises, it is in

direct conflict with that contained in the habendum. Both can not prevail. One must overrule the other. Which takes precedence, is the question. IN OUR OPINION, THE LIMITATION CONTAINED IN THE HABENDUM MUST BE REJECTED, and the estate given in the premises must prevail."

Budd vs. Brooke, 43 Am. Dec. 337-8.

"The intent, when apparent and not repugnant to any rule of law, will control technical terms, FOR THE INTENT, AND NOT THE WORDS, IS THE ESSENCE OF EVERY AGREEMENT. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." And if a deed cannot take effect in the precise way intended, yet if it can operate in another mode it will be so construed."

Devlin on Deeds, Sec. 837.

See also *Bent vs. Rogers,* 137 Mass. 192.

"In *Coleman vs. Beach,* 97 N. Y. 545, 553, Mr. Chief Justice Ruger, in delivering the opinion of the court, said: "If the disposition which the owner of the property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the courts are called upon to perform in construcing his transfers of title, is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the courts are of necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of the literal signification of the language used, must be imposed, as will give some effect if possible to all of the provisions of the deed."

Devlin on Deeds, Note, Sec. 837.

If a question of law arises upon the construction of a deed, it is the province of the court to construe it and to decide from the language what the intention of the parties was. When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to. The rule is that the intention of the parties is to be ascertained by considering all of the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable when not contrary to law."

Devlin on Deeds, Sec. 836.

"It is evident that the common law rule is generally recognized that "In case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum."

2 Tiffany Law of Real Property, 870.
Simerson vs. Simerson, 20 Haw. 65.

If the above stated rule of law is adopted in this case, "there being a clear repugnancy between the premises and the habendum, the premises will prevail, etc.," then the court will disregard the habendum, and, for the sake of argument, if the habendum should be eliminated from consideration, the paragraph following the said habendum is surely conclusive of the grantor's intention to create but a life estate in each of his daughters.

In the paragraph following the habendum, Alex-

ander Adams, Jr., vests his daughters with the power of appointment, "providing it be done in truth and honesty," but upon a failure to do so, "then in such case, these lands shall revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits only be theirs providing the second part have no children, BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM in the manner as enjoyed by their parents." The intention of the grantor is again made clear, that he intended only a life estate to vest in each of his daughters, for he says: "Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them."

"It is not the practice of courts of justice to divest persons of their estates by a rigid adherence to the rules of grammatical construction, or by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument viewed in the light of the attending facts. The sole object to be obtained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relations of the parties towards each other, will be considered; and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded, and however grossly it may violate the strict rules of grammatical construction."

Devlin on Deeds, 843.

The Supreme Court of Hawaii cites as authority for deciding this case against the plaintiffs in error, the decisions in the cases of *Simerson vs. Simerson,* 20 Haw. 57; *Nahaolehua vs. Heen,* 20 Haw. 372, 377, and *Ray vs. Spears,* 64 S. W. 413.

The ruling in these cases should not be decisive against plaintiffs in error in the case at bar, for, in all of them, both the granting and habendum clauses of the deeds conveyed the fee forever in as strong language as could be used; then adding terms or conditions which are limitations converting the title into defeasible fees, the court saying (*Ray vs. Spears Exr.,* 64 S. W. 413) : "It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with BOTH THE GRANTING and habendum clauses in the conveyance."

The deed now under consideration from its beginning to the habendum clause indicates clearly that it was not the intention to vest Peke and Maria with a fee simple estate in these lands, for Alexander Adams, Jr., says that his daughters may have these lands "to the end of their lives and forever to their heirs"; and in this connection, we desire to call the court's particular attention to the fact that the term "heirs," "children" and "issue" are used in the Adams deed synonymously.

"A construction which requires us to reject an entire clause of a deed is not to be admitted, except from unavoidable necessity; but the intention of the parties, as manifested by the language employed in the deed, should, so far as practicable, be carried into effect."

Riggin et al. vs. Love et al., 72 Ill. 556.
City of Alton vs. Ill. Trans. Co., 12 Ill. 56.
Poole vs. Blakie, 53 Ill. 500.

"It is well settled that the granting clause in a deed must prevail over the habendum, unless a contrary intention is shown by the deed. In this case both the granting and habendum clauses of the deed convey the fee forever in as strong language as could be used; and, after certain other property is conveyed, the addition to or condition is added which it is claimed is a limitation or which converts the title into a defeasible fee. It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with both the granting and habendum clauses of the conveyance."

Ray vs. Spears' Exr., 64 S. W. 414.

"A deed is to be so construed, if possible, as to give effect to it as a conveyance of some interest of the grantor in the lands therein described, and if a clause is therein found which is repugnant to the general intention of the deed, it is to be rejected as void."

Wilcoxon vs. Sprague, 51 Cal. 642.
Carllee vs. Ellsberry, 82 Ark. 209, 101 S. W. 407.

"A deed conveyed to the grantee 'and her heirs and assigns forever, a certain piece or parcel of land, situated, lying and being in Halifax, and is the same farm on which (the grantor) now lives; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, * * * always provided that in the event of her decease, the same shall revert to me, if living, if not, to my heirs, being the same farm which I purchased from Darius Plumb.' The haben-

dum was to the grantee, 'and her heirs and assigns, to her and their own proper use, benefit and behoof forever.' The deed contained the usual covenants of warranty, seisin, and against encumbrances, and also this clause following the covenants: 'Always reserving the reversion to myself and heirs, as stipulated in the deed.' The court held that the manifest intent was to convey an estate for life, and not an estate in fee, and the deed must take effect according to such intent."

Devlin on Deeds, Sec. 836.

The above statement from Devlin on Deeds is strongly supported in every particular by the following cases:

Flagg vs. Eames, 40 Vt. 16.
Collins vs. Lavelle, 44 Vt. 230;
Colby vs. Colby, 28 Vt. 10.

It is respectfully submitted that the decision in the case of *Flagg vs. Eames,* Supra, quoted in Devlin on Deeds, Supra, bears out exactly the contentions of the plaintiffs in error. The habendum clause is no stronger than the habendum clause of the deed in the case at bar, yet the entire wording of the deed was taken by the court as showing the intent to be to grant a life estate rather than the granting of a fee, as shown in the habendum. When again it is taken into consideration, as formerly argued, that the deed in the case at bar was written in the Hawaiian language, where the translated English words should not be given their technical meaning, but where the intent of the person making the deed should be considered in order that justice should be

done in the construction of the instrument, we submit that the ruling of the Supreme Court of the Territory of Hawaii against the intent of this instrument and in favor of a construction which insists upon the technical wording of a portion of the same should be reversed and judgment should be rendered in favor of the plaintiffs in error.

Respectfully submitted,

ANDREWS & PITTMAN,
FRANK ANDRADE,
Attorneys for Plaintiffs in Error.

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